South Carolina Law Review

Volume 13 | Issue 1 Article 5

Fall 1960

Administrative Law

Ernest L. Folk III
University of South Carolina School of Law

PART I

ADMINISTRATIVE LAW

ERNEST L. FOLK, III*

The two South Carolina decisions on administrative law occur in that crucial area of accommodating the potentially conflicting roles of agency and court in their orderly performance of the governmental duties allocated to them, often by vague statutory provisions. As the growing abundance of federal and state cases show, the problems of adjustment are unceasing. The two decisions discussed here should clarify the law in this State, and one in particular deserves to stand as a guidepost on the scope of judicial review of administrative action.

I. Exhaustion of Administrative Remedies[1]

As a general rule, both in federal and state law,[2] judicial review of administrative action is not available unless and until all available administrative remedies have first been resorted to, and the litigant seeking judicial review has not obtained satisfaction from the administrative remedies. In South Carolina, this rule was applied most recently in *Pullman Co. v. Public Serv. Comm'n.*,[3] which followed a substantial line of precedents in this state,[4] all in accordance with the generally accepted doctrine of exhaustion of administrative

*Associate Professor of Law, University of South Carolina.

1. The present definitive discussion of the exhaustion concept is found in 3 DAVIS, ADMINISTRATIVE LAW TREATISE 56-115 (1958) (hereinafter cited as DAVIS).

2. State and federal law are unexpectedly in harmony on the exhaustion requirement, both as to the general rule and the exceptions. New Jersey alone seems to have loosened the exhaustion requirement to permit more frequent and ready court intervention at early stages in the administrative proceeding. 3 DAVIS, 109-113.

3. 234 S. C. 365, 108 S. E. 2d 571 (1959).

4. See Williams Furniture Corp. v. Southern Coatings & Chem. Co., 216 S. C. 1, 8-10, 56 S. E. 2d 576 (1949). A number of the prior cases are cited in DePass v. City of Spartanburg, 234 S. C. 198, 203, 107 S. E. 2d 350 (1959). It should be noted, of course, that the exhaustion requirement in the administrative law area is but one instance of a broad principle of law which requires, for example, exhaustion of remedies within an organization (such as a union or other association) before challenging the organization's action in court, or resorting to arbitration where an agreement so requires.

remedies. In *Pullman,* a Public Service Commission rule regulating certain aspects of a passenger railroad service[5] was challenged by the Pullman Company before the Commission late in 1956. Some months later, while the proceeding was still pending before the Commission, the Company sought a declaratory judgment that the rule was invalid, but the complaint was dismissed for failure to exhaust available Commission remedies. It was this dismissal which the Supreme Court affirmed on the same grounds.[6]

The decision correctly states and applies the exhaustion doctrine. More important, it recognizes that the requirement is not, and should never be, an invariant rule.[7] Rather, it is a mandate to exercise sound judicial discretion—initially that of the trial court—as to whether the court's jurisdiction to hear the case should be exercised at once, or should be deferred until the administrative agency has had a fair opportunity to decide the questions itself. This recognition is often impeded by the usual judicial statement of the exhaustion requirement in absolute terms,[8] and by the fact that the great majority of the reported cases have required the exhaustion of administrative remedies. Thus, in this State, all the cases applying the exhaustion rule, including *Pullman,* have resulted in the court's refusing to hear the case before the agency has completed its proceedings[9] and in each the decision to defer judicial action seems entirely correct on the facts.

This sequence of events in the litigation is normally both fair and orderly. It is fair to the litigant since, after the administrative remedies have run their course, he almost

5. P. S. C. Rule No. 20 required intrastate railroad passenger cars to be "continuously in charge of an employee or an authorized agent . . . having the rank and position of conductor." Pullman Co. v. Public Serv. Comm'n, 234 S. C. at 367, 108 S. E. 2d at 571.

6. It appears that the case was moot when decided by the trial court on May 6, 1958, since the Commission had denied the petition on March 28, 1958, and presumably all relevant administrative remedies had been exhausted. Technically, the lower court's dismissal should have been vacated, and an order dismissing for mootness substituted.

7. "It was a proper exercise of the discretion of the court to refuse to entertain jurisdiction of the action before appellant had exhausted its administrative remedies." Pullman Co. v. Public Serv. Comm'n, 234 S. C. at 368, 108 S. E. 2d at 572.

8. For example, in the leading American case of Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 45 (1938), Justice Brandeis referred to "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted," without recognizing that the supposedly absolute rule, both before and since, has exceptions and qualifications.

9. See cases cited in note 4 *supra.*

invariably has the opportunity to secure judicial review of the agency's final order.[10] It is also orderly, for without the exhaustion rule, administrative agencies would be seriously delayed in getting to the merits of the cases which by law have been committed to them by court actions, groundless or otherwise. Finally, as a practical matter, a court will ordinarily be in a better postion to determine the issue and review the administrative action if it has the benefit of the thinking and decision of the administrative agency.

It follows from the discretionary character of the exhaustion "rule" that there are occasions for dispensing with the usual requirements. Thus, court intervention, otherwise premature, would be appropriate if an agency acted patently outside of its sphere of competence, as if the Industrial Commission sought to regulate intrastate railroad rates; but would be inappropriate merely on a litigant's claim that the facts of his particular case do not fall within the agency's jurisdiction. In short, the agency usually should have the sole initial right to determine whether a case is or is not within its jurisdiction.[11] It is also often desirable for "questions of law," as in *Pullman* to be first decided by the agency subject to court review. Similarly, exhaustion may not be required if an agency with jurisdiction has inadequate administrative remedies so that the requirement is futile,[12] if it acts so as to violate due process, *e.g.*, by refusing notice or a hearing, if it is incapable of acting because of deadlock,[13] or if it refuses to take action for one reason or another or for no reason.[14] In *Pullman,* the court noted the Commission's "delay in decision" from the hearing on December 11, 1956, to the declaratory judgment action in November 1957, but did not elaborate on "the reason" which was said to be "in dispute."[15]

10. *Pullman* notes "the approved method to obtain judicial review of decisions of the Commission affecting carriers," including the very order challenged here. 234 S. C. at 368, 108 S. E. 2d at 572.

11. On factual matters, obviously the question whether the agency has jurisdiction of the particular case before it often cannot be decided without a full inquiry into the merits and facts of the case.

12. 3 DAVIS 99 n. 14.

13. See Order of Railway Conductors v. Swan, 329 U. S. 520 (1947).

14. Smith v. Illinois Bell Tel. Co., 270 U. S. 587 (1926) (two year delay in administrative action held to justify dispensing with exhaustion requirement). An excellent recent example of the kind of agency conduct which amply justifies a court in dispensing with the exhaustion rule is Sunshine Pub. Co. v. Summerfield, 184 F. Supp. 767 (D. D. C. 1960), another stage in the Postmaster-General's war against nudist publications. By his strategy, he had forfeited any right to the benefit of the exhaustion requirement.

15. 234 S. C. at 367, 108 S. E. 2d 571.

Undoubtedly, on showing that this delay had been unreasonable, the court would have been warranted in exercising its discretion to suspend the exhaustion requirement, and proceeding to a decision itself on the matter. The few facts cited in the opinion indicate that this was probably unnecessary here.

II. Scope of Judicial Review of Administrative Action

Mr. Justice Oxner's masterly opinion in *Board of Bank Control v. Thomason*[16] contributes significantly to clarifying the vexing problem of the scope of judicial review of decisions of administrative bodies. The prevailing view, which has been especially well articulated in the federal system,[17] is that administrative action will be sustained if supported by "substantial evidence" on the record considered as a whole. Whatever may be the precise contours of this rule, and its application in any given situation, it is clear that, on the one hand, agency action is subject to some court review, and on the other, that hearings and trials de novo will not be furnished by courts to disgruntled litigants. This rule, applied as it has been to countless cases in every jurisdiction, has, on balance, given ample protection against administrative arbitrariness without, at the same time, inhibiting the freedom which is essential for effective action by those agencies. It recognizes that the problems confronting administrative bodies are often ones which they are peculiarly well equipped and courts are singularly ill prepared[18] to handle, because the problem is unusually technical. Often they involve a large number of parties or interests, or generally are not suited to judicial approaches and procedures. In short, the trend to the substantial evidence rule is so pronounced that many statutes which may seem to call for a broader or narrower scope of review have nevertheless been interpreted as requiring no more than substantial evidence.[19]

This is precisely what the *Thomason* case did. There the State Board of Bank Control, after notice and hearing, denied an application for a small loan business license, ruling,

16. 236 S. C. 158, 113 S. E. 2d 544 (1960).

17. The leading case is now Universal Camera Corp. v. NLRB, 340 U. S. 474 (1951).

18. See LANDIS, THE ADMINISTRATIVE PROCESS 34-46 (1938).

19. See the cases cited in the majority opinion, 236 S. C. at 165-166, 113 S. E. 2d at 547.

as the statute required,[20] that a license would not "promote the convenience and advantage of the community." This conclusion was based on a factual finding that no additional small loan businesses were needed in the locality. The statute specified that the reviewing court should "have jurisdiction to review the facts and the law and to affirm, modify or set aside the order or decision of the Board and restrain the enforcement thereof."[21] Before determining the correctness of the Board's fact finding, the court raised the question as to how far it could go in re-evaluating the underlying evidence. Rejecting contentions that this statute called for "de novo review"[22]—apparently the view of dissenting Justice Taylor[23]—the court concluded that the Board's findings would stand if supported by substantial evidence. This reading of the statute brought judicial review under this statute into harmony with the substantial evidence rule as applied in other South Carolina decisions.[24] The Court quite properly referred to the "experience, expert knowledge and judgment" required for making many administrative decisions, the Board's "competence in this field," and the "many determinants" of such a decision.[25] Although it is fashionable today to decry such reasons as empty clichés, they nevertheless provide sound basis for giving, as the substantial evidence rule does, a broad area in which the agency may freely act.

The reasoning of the majority opinion presents a possible difficulty for certain classes of cases which may arise in the future. In concluding that the statute embodies the substantial evidence rule, the opinion stresses the fact that the Board's action in granting or withholding a license is a "non-judicial" function subject to only limited review. Broad review by a court of an agency's "non-judicial" determination would be constitutionally inappropriate as offending the principle of the "separation of powers."[26] It is, of course, recog-

20. Besides requiring this determination, CODE OF LAWS OF SOUTH CAROLINA § 8-794.40 (Supp. 1959), requires the Board to make favorable findings as to the applicant's personal and business fitness and financial responsibility. The Board found on these points in the applicant's favor, but rested its decision on the absence of need for additional businesses in the area.

21. CODE OF LAWS OF SOUTH CAROLINA § 8-794.163 (Supp. 1959).

22. 236 S. C. at 165, 113 S. E. 2d at 547.

23. *Id.* at 170-73, 113 S. E. 2d at 550-551.

24. These are cited and briefly discussed, *id.* at 166-167, 113 S. E. 2d at 548.

25. *Id.* at 169, 113 S. E. 2d at 549.

26. *Id.* at 165-65, 113 S. E. 2d at 547.

nized that "[s]ome administrative bodies perform functions which are judicial or quasi-judicial."[27] It would be unfortunate if the court's language implies that there is to be a different standard of review of agency decisions depending upon whether their action is filed in the "judicial or quasi-judicial" or in the "legislative or quasi-legislative or administrative" slot. These vague terms are unilluminating, and certainly afford no standards for distinguishing classes of cases. The fact is that many agencies, state and federal, exercise "judicial or quasi-judicial functions," and the same rule of substantial evidence is consistently applied to reviewing these "functions." Prime examples in the Federal system are cease-and-desist orders of the Federal Trade Commission or the National Labor Relations Board. Few people today would seriously contend that a broader scope of review is necessary.

Despite the disturbing emphasis upon the facile distinction between "judicial" and "legislative" functions, it seems unlikely that the language will be read as varying the scope of review with the verbal description of the functions. Looking to the cases cited by the court as embodying the substantial evidence rule in South Carolina, two involved essentially "judicial" type administrative proceedings, *viz.* revocation of a liquor license[28] and of a license for practicing naturopathy.[29] These two cases framed the scope of review of facts as limited to "findings . . . wholly unsupported by the evidence,"[30] but the effect of the *Thomason* case is to harmonize this language with the "substantial evidence" test.[31] Finally, it is necessary, for the sake of consistency, that the same test as to the scope of review apply to both types of proceedings. Otherwise, in the very statute under which *Thomason* was decided, grant or denial of a license (a "quasi-legislative" function) would be subject to the relatively narrow test of "substantial evidence," while the Board's action in revoking or suspending an already granted license[32] (a "quasi-judicial" function) would be subject to a different, and presumably broader, scope of

27. *Ibid.*
28. Feldman v. South Carolina Tax Comm'n., 203 S. C. 49, 55, 26 S. E. 2d 22 (1943).
29. Jacoby v. South Carolina State Board of Naturopathic Ex'rs., 219 S. C. 66, 88-90, 64 S. E. 2d 138 (1951).
30. See the page citations in the two notes above.
31. 236 S. C. at 166-167, 113 S. E. 2d at 548.
32. CODE OF LAWS OF SOUTH CAROLINA § 8-794.44-46 (Supp. 1959) provides for Board action of this type.

review. In reality, both procedures are in furtherance of the single objective of sound regulation in the public interest, and are governed by the same code section providing for judicial review.[33] The alluring but dangerous short cut of distinguishing "quasi-legislative" and "quasi-judicial" action for purposes of framing the scope of review should be avoided.[34]

33. CODE OF LAWS OF SOUTH CAROLINA § 8-794.163 (Supp. 1959).

34. This article does not discuss the character of the evidence which the Court held adequately supported the Board's refusal to grant the license. See Board of Bank Control v. Thomason, 236 S. C. at 169-70, 113 S. E. 2d at 546, 549-550.